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9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA

11 MOSES ESTRADA,

12 Petitioner,

13 v.
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15 PEOPLE OF RIVERSIDE
16 CALIFORNIA,

17 Respondent.
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Case No. 5:22-cv-1893-RSWL-PD

**ORDER TO SHOW CAUSE RE:
DISMISSAL OF PETITION**

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20 On October 24, 2022, Petitioner Moses Estrada, a state prisoner in the
21 custody of the California Department of Corrections, filed a Petition for Writ
22 of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254.
23 The Court issues this Order to Show Cause directed to Petitioner because the
24 Petition sets forth no specific grounds for relief and Petitioner concedes that
25 any ground for relief he seeks to raise is unexhausted.

26 **I. Procedural History and Petitioner's Contentions**

27 In March 2019, a San Bernardino County Superior Court jury convicted
28 Petitioner of seven counts of lewd or lascivious conduct against two victims
under the age of 14, in violation of California Penal Code section 288(a). The

1 jury also found true the allegation that he committed the offenses against
 2 multiple victims pursuant to California Penal Code section 667.61. He was
 3 sentenced to 150 years to life in state prison. [See Dkt. No. 1 at 2.]

4 Petitioner appealed, alleging three claims: (1) there was insufficient
 5 evidence to support one of the lewd or lascivious counts; (2) the trial court
 6 committed instructional error; and (3) his sentence was cruel and unusual.
 7 See *People v. Estrada*, No. E073286, 2021 WL 1904544, at *1 (Cal. Ct. App.
 8 May 12, 2021). He also asked the court of appeal to review a sealed transcript
 9 from the trial proceedings to determine whether the trial court erred in
 10 denying his request for personnel records of a law enforcement officer. See *id.*
 11 The court of appeal ordered Petitioner's abstract of judgment corrected but
 12 otherwise affirmed the judgment. See *id.* at 10. Petitioner then filed a
 13 petition for review, which the California Supreme Court denied on July 21,
 14 2021.¹ [See Dkt. No. 1 at 3.]

15 On October 19, 2021, Petitioner filed a petition for writ of certiorari in
 16 the U.S. Supreme Court, which denied it on January 10, 2022. See U.S. Sup.
 17 Ct. Docket Search, <https://www.supremecourt.gov/docket/docket.aspx> (search
 18 by name) (last visited Nov. 29, 2022). Petitioner then filed a motion to recall
 19 the remittitur in the court of appeal, which denied the motion on September
 20 26, 2022. See Cal. App. Cts. Case Info., <http://appellatecases.courtinfo.ca.gov/>
 21 (search Dist. 4, Div. 2 for "Moses" with "Estrada") (last visited Nov. 29, 2022).

22 II. Discussion

23 A. Duty to Screen

24 Rule 4 of the Rules Governing § 2254 Cases requires the Court to
 25 conduct a preliminary review of the Petition. Pursuant to Rule 4, the Court
 26 must summarily dismiss a petition "[i]f it plainly appears from the face of the
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28 ¹ Based on Petitioner's allegations, it appears that he only sought review of the court
 of appeal's denial of his sufficiency-of-the-evidence claim. [See Dkt. No. 1 at 3.]

petition . . . that the petitioner is not entitled to relief in the district court.” Rule 4 of the Rules Governing 2254 Cases; *see also Hendricks v. Vasquez*, 908 F.2d 490 (9th Cir. 1990). Based on a preliminary review, the Petition appears to be subject to dismissal because it contains no specific grounds for relief and because Petitioner concedes that any ground for relief he seeks to raise is unexhausted. Petitioner therefore must show cause as to why the Petition should not be dismissed.

B. The Petition Does Not Identify Any Grounds for Relief

Rule 2(c) of the Rules Governing Section 2254 Cases states that a petition “shall specify all the grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge and shall set forth in summary form the facts supporting each of the grounds thus specified.” Rule 2(c), 28 U.S.C. foll. § 2254. “[I]n order to substantially comply with the Section 2254 Rule 2(c), a petitioner must state specific, particularized facts which entitle him or her to habeas corpus relief for each ground specified. These facts must consist of sufficient detail to enable the court to determine, from the face of the petition alone, whether the petition merits further habeas corpus review.” *Adams v. Armontrout*, 897 F.2d 332, 334 (9th Cir. 1990). “[N]otice’ pleading is not sufficient, for the petition is expected to state facts that point to a ‘real possibility of constitutional error.’” Rule 4 Advisory Committee Notes (quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st Cir.1970)).

Here, Petitioner has not complied with Habeas Rule 2(c). Indeed, he has not identified any ground for relief, let alone alleged particularized facts supporting any such ground or grounds. Instead, he states only the following: “Claims are not exhausted must file state habeas corpus in lieu of court of appeal denial of recall of remittitur.” [Dkt. No. 5.] Although he has attached what appears to be the motion for recall of remitter that he filed in the court

1 of appeal,² it is not clear which of the claims asserted therein, if any, he seeks
 2 to assert in this action. Accordingly, dismissal is warranted unless he can
 3 remedy the deficiency.³ *See McFarland v. Scott*, 512 U.S. 849, 856 (1994)
 4 (habeas petitions that appear on their face to be legally insufficient are
 5 subject to summary dismissal pursuant to Rule 4).

6 C. Any Claim Petitioner Seeks to Assert Is Unexhausted

7 Under 28 U.S.C. § 2254(b), habeas relief may not be granted unless a
 8 petitioner has exhausted the remedies available in state court. Exhaustion
 9 requires that the petitioner's contentions were fairly presented to the state
 10 courts, *Ybarra v. McDaniel*, 656 F.3d 984, 991 (9th Cir. 2011), and disposed of
 11 on the merits by the highest court of the state, *Greene v. Lambert*, 288 F.3d
 12 1081, 1086 (9th Cir. 2002). As a matter of comity, a federal court will not
 13 entertain a habeas petition unless the petitioner has exhausted the available
 14 state judicial remedies on every ground presented in it. *See Rose v. Lundy*,
 15 455 U.S. 509, 518-19 (1982).

16 Here, Petitioner concedes that he had not exhausted whichever ground
 17 or grounds for relief he seeks to assert in this action. [See Dkt. No. 1 at 5.]
 18 Accordingly, the Petition is subject to dismissal on that basis unless Petitioner
 19 takes steps to cure the defect. *See Rasberry v. Garcia*, 448 F.3d 1150, 1154
 20 (9th Cir. 2006).

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 22 ² As the copy of the motion attached to the Petition is not filed-stamped, the Court
 23 cannot determine if it is the same motion that he filed in the court of appeal.

24 ³ The Court also notes that many of the ineffective-assistance claims that Petitioner
 25 asserted in his motion for recall of the remittitur fail to set forth any supporting
 26 facts or clearly identify how counsel's performance was allegedly deficient or
 27 prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984) (petitioner
 28 cannot succeed on ineffective-assistance-of-counsel claim unless he can show that
 counsel's performance was unreasonable and that the reasonable likelihood exists
 that but for his counsel's errors, the result would have been different); *see also*
James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) ("Conclusory allegations which are not
 supported by a statement of specific facts do not warrant habeas relief.").

III. Conclusion

For the foregoing reasons, Petitioner must show cause why the Petition should not be dismissed for failure to state a claim and for failure to exhaust. Accordingly, the Court **ORDERS** Petitioner to select one of the following options **by no later than by January 6, 2023**:

Option One:

(1) Petitioner must file a First Amended Petition on the Central District of California's form Petition for Writ of Habeas Corpus. The amended petition should reflect the same case number (CV 5:22-cv-1893-RSWL-PD), be clearly labeled "First Amended Petition," and be filled out completely. In section 8 of the First Amended Petition, Petitioner must specify separately and concisely each federal constitutional claim that he seeks to raise and answer all of the questions pertaining to each claim. Petitioner is free to attach additional pages if he asserts more than five grounds for relief. The Court Clerk is directed to send Petitioner a blank copy the Central District's form Petition for Writ of Habeas Corpus by a Person in State Custody; **AND**

(2) If Petitioner concedes that the First Amended Petition is completely unexhausted, he should file a formal stay-and-abey motion under *Rhines v. Weber*, 544 U.S. 269 (2005), if he believes he can make the required showings. Under *Rhines*, the prerequisites for obtaining a stay while the petitioner exhausts his state remedies are as follows: (1) he must show good cause for his failure to earlier exhaust the claim in state court, (2) the unexhausted claim must not be "plainly meritless," and (3) he must not have engaged in "abusive litigation tactics or intentional delay." 544 U.S. at 277-78. Petitioner is advised now, however, that he is not required to obtain a stay before

1 he starts the process of exhausting any unexhausted claim. Nothing
2 prevents him from immediately returning to state court to attempt
3 to exhaust his unexhausted claims.

4 **Option Two:**

5 Petitioner may request that the Petition be dismissed without prejudice
6 under Federal Rule of Civil Procedure 41(a)(1), with the understanding that
7 any later petition might be time barred under § 2244(d)(1). *See* 28 U.S.C.
8 § 2244(d)(1) (“A 1-year period of limitation shall apply to an application for a
9 writ of habeas corpus by a person in custody pursuant to the judgment of a
10 State court.”).

11 **Petitioner is admonished that his failure to timely respond to**
12 **this Order will result in the Court dismissing this action without**
13 **prejudice for failure to comply with Habeas Rule 2(c), failure to**
14 **exhaust, and failure to prosecute and comply with court orders. *See***
15 **Fed. R. Civ. P. 41(b).**

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17 **IT IS SO ORDERED.**

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20 DATED: November 30, 2022

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22 PATRICIA DONAHUE
23 UNITED STATES MAGISTRATE JUDGE
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